Supreme Court, U.S.
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No. 92-676

In The

Supreme Court of the United States

October Term, 1992

FRED T. WILBURN,

Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this personal injury action by plaintiff-petitioner, a railroad employee, against the defendant-respondent, Consolidated Rail Corporation, under the Federal Employers Liability Act, Title 45, U.S.C., Sections 51 and following, did the trial court commit error by granting the Respondent's motion for summary judgment pursuant to rule 56(c) of the Federal Rules of Civil Procedure?

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STATUTES AND RULES INVOLVED

Respondent hereby adopts by reference the statements set forth in petitioner's brief with the addition of the following:

Federal Rules of Civil Procedure, 56. Summary Judgment

a. Does not apply.

b. Does not apply

c. Provides in pertinent part:

> . . . [summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

d. Does not apply.

e. Does not apply.

f. Does not apply.

g. Does not apply.

STATEMENT OF THE CASE

On March 31, 1987, the plaintiff, Fred T. Wilburn, filed a Complaint seeking damages for injuries allegedly sustained on September 5, 1985.[1]

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[1] In deciding whether an issue of material fact does or does not exist, the court is required to resolve all doubt in favor of the

The plaintiff was employed as a trackman with the defendant/respondent, Consolidated Rail Corporation (hereinafter "Conrail"). On the date of this incident, the plaintiff was acting as a welder's helper. (R. 33). He was assigned that day to assist Jay "Chicken Leg" Hunter, who was a senior qualified welder. (R. 34). They were working around Barbour Street in Woodbury, New Jersey. (R. 34). By his own admission, the plaintiff was acting as a welder's helper, which involved looking out for Mr. Hunter, getting tools, etc. (R. 34-35).

"Chicken Leg" Hunter likewise testified that one of the responsibilities of a welder's helper is to watch for the welder or act as a flagman. (R. 41-43).

At approximately 8:00 p.m., the plaintiff was bent over cutting a piece of rail when a dog (allegedly co-defendant's black Labrador) snapped at him and bit him on the right leg (without breaking the skin). (R. 37, 39). In backing away from the dog, the plaintiff tripped and fell striking his back on a railroad rail. (R. 37). Mr. Hunter was at work welding when he heard the commotion of the purported canine attack. (R. 43, 47).

The dog had apparently been observed about the area earlier in the day. (R. 35). However, there was no unruly, mischievous or vicious behavior on the dog's part. In fact, the dog appears to have acted very much the

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non-moving party. *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 (3d Cir. 1983), *cert. denied* 465 U.S. 1091 (1984); *Smith v. Pittsburgh Gage and Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972). Therefore, although respondent disputed the plaintiff's version of events, for purposes of the motion for summary judgment his testimony was accepted as true.

part of "Man's Best Friend." The plaintiff has said of his prior sightings of the dog, "He was a friendly dog." He was not observed behaving in an unfriendly manner. (R. 36-37)

On May 3, 1988 the case was submitted to arbitration. The arbitrator rendered an award specifically finding no negligence on the part of respondent. (R. 17).

Thereafter, on November 14, 1988, Respondent filed a motion for summary judgment which was granted by the trial court on April 6, 1989 by memorandum and order. (R. 18). Petitioner moved for reconsideration which was denied by memorandum and order dated May 5, 1989. (R. 23). On December 16, 1991, petitioner's action against the dog owners was concluded by stipulation and order of dismissal, reserving all rights as against the respondent. (R. 25). Petition appealed to the United States Court of Appeals for the Third Circuit. Said court affirmed without opinion the trial courts granting of respondent's motion for summary judgment.

Petitioner Fred R. Wilburn now seeks review based on what he characterizes as inconsistent applications of the appropriate judicial test for when a jury should be permitted to determine the negligence, or lack thereof, of a railroad employer under the FELA. Petitioner maintains that the decision rendered in this case by the United States District Court for the District of New Jersey and affirmed by the United States Court of Appeals for the Third Circuit is in direct conflict with the opinion of the United States Court of Appeals for the Second Circuit in the case of *Gallose v. Long Island R. Co.*, 878 F.2d 80 (2nd

Cir. 1989). This contention is meritless as there are substantial factual differences between the two cases. Furthermore, in the case at hand, no opinion was ever published by the United States Court of Appeals for the Third Circuit, therefore, there can be no conflict between the Courts of Appeal.

ARGUMENT

POINT I

SUMMARY JUDGMENT IS THE APPROPRIATE STANDARD OF REVIEW WHEN NO MATERIAL QUESTIONS OF FACT EXIST.

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> . . . [summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to a judgment or order as a mater of law.

See also, Hersh v. Allen Products. Co., Inc., 789 F.2d 230, 232 (3d Cir. 1986); *Lang v. New York Life Ins. Co.*, 721 F.2d 118 (3d Cir. 1983). The mere existence of factual issues where those issues are not material to claims before the court will not suffice to defeat a motion for summary judgment. *Jersey Central Power & Light Co. v. Lacey Tp.*, 772 F.2d 1103, 1109 (3d Cir. 1985). The issue in dispute must be outcome determinative under the applicable law. *Id.*

The threshold inquiry of determining whether there is a need for trial, is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Summary judgment may be granted if the evidence favoring the non-moving party is merely colorable or is not significantly probative. *Id.* One of the principal purposes of the summary judgment rule is to isolate and dispose factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Thus, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof. *Id.*

POINT II

THE FEDERAL EMPLOYER'S LIABILITY ACT DOES NOT IMPOSE LIABILITY UPON AN EMPLOYER RAILROAD ABSENT A SHOWING OF NEGLIGENCE.

The plaintiff has brought the present action against Conrail under the Federal Employer's Liability Act (FELA), 45 U.S.C. §51 *et seq.* Section 51 of the Act provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part

> from the negligence of any of the officers, agents, or employees of such carrier . . .

The FELA imposes liability upon an employer to pay damages for injury due "in whole or in part" to its negligence. The question is whether there is any evidence that any employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence played any role in producing the harm. *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 116 (1963). Whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion can be drawn that negligence of the employer played any part at all in the plaintiff's injury. *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506-507 (1957).

But, while there is a considerably relaxed standard of proof in FELA cases, the Act does not provide for strict liability against employers nor make them insurers of employees' safety. *See Inman v. Baltimore & Ohio Railroad Co.*, 361 U.S. 138 (1959); *Thomas v. Grigorescu*, 582 F.Supp. 514 (S.D.N.Y. 1984), *aff'd mem.* 751 F.2d 371 (2d Cir. 1984); *Nivens v. St. Louis Southwestern Ry. Co.*, 425 F.2d 114 (5th Cir. 1970), *cert. denied* 400 U.S. 879 (1970); *Foote v. Erie Lackawanna Ry. Co.*, 142 N.J. Super. 195 (App. Div. 1976); *Ottley v. St. Louis–San Francisco Ry. Co.*, 360 Mo. 1189, 232 W.2d 966 (1950). Before a recovery can be had, there must be a showing by either direct or circumstantial evidence that the railway company was negligent. *Illinois Cent. R. Co. v. Skaggs*, 240 U.S. 66 (1916). *See also, New Orleans, N.E.R. Co. v. Harris*, 247 U.S. 367 (1918). The mere fact of injury will not warrant a recovery; there must be some negligence on the part of the railroad company or on the part of some employee as the basis for liability. *San*

Antonio & A.P. R. Co. v. Wagner, 241 U.S. 476 (1916). *See also, Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943); *Chesapeake & O. Ry. Co. v. Stapleton*, 279 U.S. 587 (1929). There must also be a showing that negligence on the part of the employer was a proximate cause of the employee's injury. *See Moody v. Maine Central R.R. Co.*, 823 F.2d 693, 695 (1st Cir. 1987).

Absent some sort of statutory violation by the railroad, the long established principles of negligence apply. *See Pratico v. Portland Terminal Co.*, 783 F.2d 255, 262 (1st Cir. 1985). The measure of duty owed to an employee under the FELA is that of reasonable and ordinary care. *Delaware L. & W.R. Co. v. Koske*, 279 U.S. 7 (1929). The employer is bound to do what a reasonable and prudent man would ordinarily do under the circumstances. *Anderson v. Atchison, T. & S.F. Ry. Co.*, 333 U.S. 821 (1948).

Under the FELA, the railroad is obligated to provide its employees with a reasonably safe place to work. *Padgett v. Southern Ry. Co.*, 396 F.2d 303 (6th Cir. 1968). However, the railroad is not obligated to eliminate all risks in the workplace; it is only obligated to eliminate unreasonable risks. *See Ragsdell v. Southern Pac. Transportation Co.*, 688 F.2d 1281 (9th Cir. 1982); *Tobin v. Nat'l R. Passenger Corp.*, 677 F.Supp. 674 (D.Mass. 1988). The diligence required of an employer to furnish employees with a safe place to work is commensurate with the dangers reasonably apprehended. *Williams v. Atlantic Coast Line R. Co.*, 190 F.2d 744 (5th Cir. 1951). A railroad is not required to anticipate and guard against unexpected and improbable dangers to employees. *Morey v. Maine Cent. R. Co.*, 127 Me. 190, 142 A. 585 (1928). Events which are too

remote to require reasonable provision need not be anticipated. *Brady, supra.*

The plaintiff in an FELA action must establish the "reasonable foreseeability of harm." *Gallick, supra,* at 117. A railroad is not liable for failing to provide a safe workplace if it has no reasonable way of knowing that the potential hazard exists. *Beeber v. Norfolk Southern Corp.,* 754 F.Supp. 1364, 1368 (N.D. Ind. 1990) (citing *Gallose v. Long Island R. Co.,* 878 F.2d 80, 85 (2d Cir. 1989)

The trial court found, and the appellate court affirmed, that plaintiff had presented no evidence that would support even an inference that Conrail was aware of any danger presented by the dog. (R. 21). To the contrary, deposition testimony from the plaintiff himself established that the dog in all earlier contact had been even-tempered and playful. In essence, the trial court found as a matter of law that plaintiff had not established the "reasonable foreseeability of harm," or in other words, that Conrail had any reasonable way of knowing that the dog constituted a potential hazard. The plaintiff himself described the dog before the alleged attack as a "friendly dog". (R. 36).

The FELA is basically predicated upon negligence. *O'Donnell v. Elgin, J.& E. R. Co.,* 338 U.S. 384, 391 (1949). This means that if there is no statutory violation, traditional negligence principles apply. *Pratico, supra.* In New Jersey, the common law was that owners of domesticated animals, such as dogs, were liable only if they had *scienter,* i.e. knowledge of the animal's dangerous or mischievous propensities. *DeRobertis by DeRobertis v. Randazzo,* 94 N.J. 144, 150 (1983). One not an owner of a vicious dog

may be liable as a keeper or joint owner, if he has such knowledge if its vicious disposition. *Mascola v. Mascola*, 168 N.J. Super. 122, 127 (App. Div. 1979). The trial court's ruling was thus consistent with the long-established principle that a non-owner of a dog cannot be held liable without prior knowledge of the dog's vicious propensities. There is no basis in the FELA to hold a railroad to a higher standard of care.

POINT III

THE COURT'S DECISION IN THE MATTER AT HAND IS NOT INCONSISTENT WITH THE COURT'S DECISION IN *GALLOSE*. THUS CERTIORARI SHOULD BE DENIED.

Certiorari should not be granted except in those cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion or authority between courts of appeal. *Rice v. Sioux City Memorial Park Cemetery*, 75 S. Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955) quoting *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L.Ed. 712 (1923). Here, not only is there not a real and embarrassing conflict between court of appeal, there is not conflict whatsoever.

The Plaintiff relies upon *Gallose, supra*, which was decided after the trial court's decision on Conrail's summary judgment motion. The facts of that case differ materially from those involved in the case *sub judice*. In *Gallose*, plaintiff's co-employee brought a large German shepherd-mix dog to the workplace, where it remained in

a bathroom until its escape and attack upon plaintiff. The dog in that case was on the employer's premises from the time the plaintiff's co-employee brought it to work until the attack. In the present case, the dog had been in the area earlier, but there is no evidence Conrail had knowledge that it was in the area immediately before its alleged attack upon plaintiff. Furthermore, in *Gallose*, the plaintiff was apparently unaware of the presence of the dog at the workplace, thus raising the issue of the employer's negligence in failing to inform its employees of the dog's presence. To the contrary, the plaintiff here was aware of the dog being in the area during the day and, therefore, had the same information as his employer.

Under the circumstances, it would be unreasonable to impose upon Conrail a duty to anticipate the dog's alleged attack. The plaintiff asserts that Conrail should have furnished him with a lookout. However, the plaintiff himself was a welder's helper whose duties included acting as a lookout for the welder. Essentially, the plaintiff claims Conrail should have provided a helper for the welder's helper, or a welder's helper's helper. It is not clear how an extra helper would have prevented the alleged sudden attack, since no one had any reason to suspect such behavior from the dog.

CONCLUSION

Based upon the foregoing reasons, it is respectfully requested that this court should deny *certiorari* as summary judgment was correctly granted in the trial court, no conflict exists between the United States Court of

Appeals for the Second Circuit and the United States Court of Appeals for the Third Circuit, and petitioner has failed to present a substantial question for review of the Supreme Court of the United States of America.

Respectfully submitted,

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